LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 24 1975
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1061

PARK ANDERSON, Warden,
Petitioner,
VERSUS
TERRY LEE RADCLIFF,
Respondent.

JOHN GRIDER, Warden, Oklahoma State Reformatory, SAM ISAACS, Probation and Parole Officer, Department of Corrections, State of Oklahoma,
Petitioners,
VERSUS
WILLIAM LYNN STRINGFIELD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

LARRY DERRYBERRY
Attorney General of Oklahoma
PAUL CROWE
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105
Counsel for Petitioners

of Counsel:
KAY KAREN KENNEDY
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105

February, 1975

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutory Provisions Involved	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	16

APPENDICES

Appendix A—Opinion of the United States Court of Appeals, Tenth Circuit (June 14, 1974) ..... i-vi

Appendix B—Opinion of the United States Court of Appeals, Tenth Circuit (January 25, 1975) ..... vii-xix

Appendix C—Order of the United States District Court for the Northern District of Oklahoma in Case No. 73-C-81, In the Matter of Terry Lee Radcliff, Petitioner v. Park Anderson, Warden, Oklahoma State Penitentiary, Respondent ..... xix-xxii

Appendix D—Findings of Fact, Conclusions of Law and Entry of Judgment, United States District Court for the Northern District of Oklahoma, Case No. 72-C-236, William Lynn Stringfield, Petitioner v. John Grider, Warden, Oklahoma State Reformatory, Granite, Oklahoma, Respondent ..... xxiii-xxxi

Appendix E—Consolidation of 73-1520 and 73-1550 ..... xxxi-xxxii

Appendix F—Order Granting Rehearing ..... xxxiii-xxxiv

Appendix G—Order Withdrawing July 9 Order ..... xxxv-xxxvi

TABLE OF AUTHORITIES

CASES: PAGE

Brown v. Cox, 481 F.2d 622 (4th Cir. 1973) 15

Central Railroad Company of New Jersey, In re, 485 F.2d 208 (3rd Cir. 1973) 8

Chavez v. Baker, 399 F.2d 943 (10th Cir. 1968) 16

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 829 (1940) 13

Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) 10

Goldsmith v. Cheney, 447 F.2d 624 (10th Cir. 1971) 16

Gosa v. Mayden, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973) 9, 12

Great Northern Railroad Company v. Sunburst Oil Refinery Company, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932) 7

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, reh. den. 381 U.S. 957 (1965) 10

Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), reh. den. 385 U.S. 890 11

Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972) 3, 5, 6, 7, 8, 9 11, 12, 13, 14, 15

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) 7, 9, 10

Long v. Robinson, 436 F.2d 1116 (4th Cir. 1971) 14

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) 10

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 10

Schaffer v. Green, Okla. Cr., 496 P.2d 375 (1972) 3, 6, 15

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) 9, 10

AUTHORITIES CONTINUED PAGE

Tehan v. U. S. ex rel. Shott, 392 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), reh. den. 383 U.S. 931, 86 S.Ct. 925, 15 L.Ed.2d 850 ..... 7, 10

United States v. Lewis, 475 F.2d 571 (5th Cir. 1972) 8

United States v. Mount, 438 F.2d 1072 (9th Cir. 1971) 8

United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) 10

Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971) 9

Wolff v. McDonnell, ___ U.S. ___, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) 9

Woodall v. Pettibone, 465 F.2d 49 (4th Cir. 1972), cert. den. 413 U.S. 922 ..... 14, 15

STATUTES:

2 O.S. §152 ..... 4, 15

10 O.S. 1969, §1101(a) 3, 5, 7, 8, 9, 13, 14

OTHER:

House Bill 123, Chapter 5a, Title 10 Oklahoma Session Laws 1941 7

Senate Bill 446, codified as 10 O.S. Supp. 1968, §1101 et seq. 13

In the
Supreme Court of the United States
OCTOBER TERM, 1974

No. ———

PARK ANDERSON, Warden,
Petitioner,

VERSUS

TERRY LEE RADCLIFF,
Respondent.

JOHN GRIDER, Warden, Oklahoma State Reformatory, SAM ISAACS, Probation and Parole Officer, Department of Corrections, State of Oklahoma,
Petitioners,

VERSUS

WILLIAM LYNN STRINGFIELD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Comes now the Attorney General of the State of Oklahoma on behalf of the petitioners, named above, and respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Tenth Circuit entered in the proceedings on June 14, 1974, and January 24, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The opinion of the United States Court of Appeals for the Tenth Circuit was rendered on the 14th day of June, 1974 [Appendix "A"]. A petition for rehearing *en banc* was timely filed. The court denied the rehearing in an opinion issued on the 24th day of January, 1975. Said opinion is not yet reported [Appendix "B"].

The opinion of the United States District Court for the Northern District of Oklahoma in the case styled *Terry Lee Radcliff* v. *Park Anderson*, Case No. 73-C-81, is unreported. The opinion, rendered by the Honorable Fred Daugherty, was entered in the 6th day of June, 1973 [Appendix "C"]. The opinion of the United States District Court for the Northern District of Oklahoma in the case styled *William Lynn Springfield* v. *John Grider, et al.*, Case No. 72-C-236, is unreported. The opinion was rendered by the Honorable Allen Barrow on the 17th day of June, 1973 [Appendix "D"].

On the 31st day of August, 1973, the Court of Appeals for the Tenth Circuit ordered the consolidation of the cases for the purposes of briefing and argument [Appendix "E"].

JURISDICTION

The opinions and judgments filed on June 14, 1974, and the order denying petitions for rehearing filed on January 24, 1975, are now presented for review. This petition for certiorari was filed within ninety (90) days of the date the appellate court denied the petitions for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the court below err by holding that the panel which heard the *Lamb* case (*Lamb* v. *Brown*, 456 F.2d 18 [10th Cir. 1972]), did not have the authority to apply that decision prospectively?

2. Should the decision in *Lamb* v. *Brown, supra*, be given retroactive effect?

3. Did the Court of Appeals err by limiting the retroactivity of the *Lamb* decision to 1969?

4. Did the Court of Appeals err by failing to affirm the convictions under the controlling state law rendered in *Schaffer* v. *Green*, Okla. Cr., 496 P.2d 375 (1972)?

5. If the holding in *Lamb* v. *Brown, supra*, is to be given retroactive effect, should the State of Oklahoma be allowed to present evidence to show that the habeas applicant would have been certified as an adult and thus the applicant was not prejudiced.

STATUTORY PROVISIONS INVOLVED

Title 10, Section 1101(a), Oklahoma Statutes 1969, states in pertinent part:

> "The term 'delinquent child' means (1) any male person under the age of sixteen (16) years and any female person under the age of eighteen (18) years, who has violated any federal or state law or municipal ordinance, excepting a traffic statute or ordinance, or any lawful order of the court made under this act; or (2) a child who has habitually violated traffic laws or ordinances."

Title 21, Section 152, Oklahoma Statutes, states in pertinent part:

> "All persons are capable of committing crimes, except those belonging to the following classes:
>
> 1. Children under the age of seven years.
> 2. Children over the age of seven years, but under the age of fourteen years, in the absence of proof that at the time of committing the act or neglect charged against them, they knew its wrongfulness. . . ."

STATEMENT

William Lynn Stringfield was convicted upon a plea of guilty of the crime of Burglary of an Automobile, State Case No. CRF-71-27, in the District Court of Tulsa County, State of Oklahoma. The state court entered an order of probation and deferred sentence on the 11th day of March, 1971. The sentence was accelerated and imposed on August 30, 1971. Respondent Stringfield exhausted all appellate remedies in the state courts by December, 1971. Respondent Stringfield was 17 years of age at the time of conviction.

Terry Lee Radcliff is presently incarcerated in the Oklahoma State Penitentiary by virtue of a conviction for the crime of Armed Robbery, After Former Conviction of a Felony. The prior felony conviction used to enhance punishment is in issue. Radcliff was previously convicted in Case No. 21197 for the crime of Unauthorized Use of a Motor Vehicle. He received a one-year suspended sentence, said sentence was subsequently revoked on March 11, 1966. Petitioner was seventeen years of age at the time of the revocation.

In 1972 and 1973, the two state prisoners filed separate petitions for habeas corpus relief in the United States District Court for the Northern District of Oklahoma. These habeas applicants were challenging the heretofore mentioned convictions on the ground of the unconstitutionality of the state statute which allowed males aged sixteen and seventeen years to be tried as adults whereas similarly aged females were treated as juveniles. The issue of the constitutionality of that state statute was previously decided by the Court of Appeals for the Tenth Circuit in March, 1972. In *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972), the Court declared void on constitutional grounds the 1969 Oklahoma Statute, 10 O.S. 1969, § 1101(a), which provided in pertinent part:

> "The term 'child' means any male person under the age of sixteen (16) years and any female person under the age of eighteen (18) years."

The Court stated in the opinion that the decision would be given prospective application only. Therefore, the habeas applicants were seeking retroactive application of the *Lamb* decision in order to void their convictions.

The Honorable Fred Daugherty, United States District Judge, dismissed Radcliff's petition and followed the holding of the appellate court in *Lamb* regarding non-retroactivity [Appendix "C"]. The Honorable Allen Barrow, District Judge for the Northern District, granted the habeas writ and held that the *Lamb* decision should be given retroactive application [Appendix "D"].

Appeals were perfected by the respective parties-in-error. The Court of Appeals consolidated the cases for the

purpose of oral argument. On June 14, 1974, that court held that the statement of nonretroactive application set forth in *Lamb* was dictum. The court held that the *Lamb* decision would be given retroactive application [Appendix "A"].

Petitions for rehearing *en banc* were timely filed. On July 9, 1974, the court withdrew the opinion filed on June 14, 1974, and vacated said judgment. Rehearing *en banc* was granted and the parties were ordered to simultaneously file briefs [Appendix "F"].

On the 10th day of July, 1974, the court withdrew the July 9th order and directed the parties to brief the issue of the retroactivity of the decision in *Lamb* v. *Brown, supra* [Appendix "G"].

On the 24th day of January, 1975, the court *en banc* denied the petitions for rehearing and held that the habeas applicants were denied the benefits of the Oklahoma Statutes pertaining to juveniles [Appendix "B"].

Subsequent to the issuance of the *Lamb* decision, the Oklahoma Court of Criminal Appeals rendered an opinion in *Schaffer* v. *Green*, Okla. Cr., 496 P.2d 375 (1972), wherein the court stated that retroactive or prospective application of the *Lamb* decision would not affect the validity of cases wherein males aged 16 to 18 years were challenging their convictions under the theory set forth in *Lamb*. The court held that the convictions would be valid under 21 O.S. § 152. The court below did not consider the validity of the convictions presented under the law set forth in *Schaffer, supra*.

The court below also failed to consider the effect of the *Lamb* decision on those cases between 1941 and 1969. Al-

though 10 O.S. § 1101(a) was enacted in 1968 and became effective in 1969, the initial statute which established the age-sex distinction was enacted in 1941. [House Bill 123, Chapter 5a, Title 10 Oklahoma Session Laws 1941, enacted May 1, 1941.]

REASONS FOR GRANTING THE WRIT

I.

The court below has failed to follow the decisions of this Court in *Great Northern Railroad Company* v. *Sunburst Oil Refinery Company*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932); *Linkletter* v. *Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Tehan* v. *Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), *rehearing denied* 383 U.S. 931, 86 S.Ct. 925, 15 L.Ed.2d 850, which held that courts may determine the prospective or retroactive application of a decision.

The court below held that the original panel hearing the case of *Lamb* v. *Brown, supra,* was not presented with the question of retroactivity, and thus the statement as to nonretroactivity was dictum which "rises no higher than comment merely obitur."

It is respectfully submitted that the decision in the court below is in conflict with the rulings by this Court which state that a court may make decisional rules prospective in application and the constitution neither prohibits nor requires retroactive effect.

It is submitted that the statement of nonretroactivity made in the *Lamb* case, *supra,* was a valid exercise of that court's discretion in applying the new rule prospectively.

Furthermore, it is respectfully submitted that the State of Oklahoma is greatly prejudiced by the reversal of the *Lamb* panel's determination of nonretroactivity. Since March 1972, authorities of this State, relying upon the court's previous position of prospective application of the *Lamb* holding, have used pre-*Lamb* convictions to enhance punishment and impeach credibility. The court below failed to consider the prejudice created and the effect their decision will have on a great number of criminal convictions.

It is also submitted that the court below erred by failing to grant the petitions for rehearing *en banc*. By denying said petitions, the court, in effect, allowed one panel of Circuit Judges to overrule a second panel's previous decision. Courts of Appeals for the Fifth, Third and Ninth Circuits have stated that the overruling of a decision must be made by the court *en banc*. See *United States* v. *Lewis*, 475 F.2d 571 (5th Cir. 1972); *In re Central Railroad Company of New Jersey*, 485 F.2d 208 (3rd Cir. 1973); *United States* v. Mount, 438 F.2d 1072 (9th Cir. 1971).

II.

This Court should grant review for the reason that the opinion of the court below is in conflict with the judgments entered. In the opinion issued on January 24, 1975 [Appendix "B"], the court *en banc* held that both habeas applicants were denied the benefits of the Oklahoma statutes pertaining to juveniles. However, the Court also states that the decision holds that retroactive application is to be granted only to those cases which allege that 10 O.S. 1969, §1101 is unconstitutional.

Respondent Radcliff challenged the validity of a 1965 conviction. Thus, the 1965 conviction was not obtained under the authority of 10 O.S. 1969, §1101. The court's holding is thus erroneous and/or contradictory. It should also be noted that despite the denial of the petitions for rehearing, the opinion by the court *en banc* goes beyond the opinion and judgment dated June 14, 1974, and holds that Radcliff is entitled to relief. The opinion issued on January 24, 1975, creates confusion and presents three non-uniform Tenth Circuit decisions.

III.

The decision below should be reviewed because it erroneously interprets the law of retroactivity. Either the decision below is in conflict with the decisions of this Court in *Linkletter* v. *Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *Williams* v. *United States*, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971); *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Gosa* v. *Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973); *Wolff* v. *McDonnell*, ... U.S. ....., 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); or, if it is not so in conflict, the issues of far-reaching importance left undecided in the cases below must be faced. In either event, this Court should grant review.

The opinions below reflect that the court found that "basic fairness and essential justice" demand that the decision in *Lamb* be given retroactive effect. Petitioners respectfully submit that this is not the proper test to be applied in determining the retroactivity or prospectivity of a new ruling. It is respectfully submitted that the issue

should have been resolved by applying the three-prong test set forth in *Linkletter* v. *Walker, supra,* to-wit:

(1) the purpose to be served by the new standards; (2) the extent of the reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards. The court below found no defect, constitutional or otherwise, in the criminal proceeding which resulted in the convictions. Thus, it may be assumed that respondents received the same constitutional protections afforded others accused in adult criminal proceedings. The constitutional integrity of the adjudicative process which convicted these respondents is not in question. The accuracy of the fact-finding process is not in question.

Heretofore, this Court has rejected complete retroactive effect for constitutional rulings on issues viewed not to have had a prejudicial impact on the fairness of the adjudicative process: *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) [rule proscribing state's use of illegally seized evidence held not retroactive in *Linkletter* v. *Walker, supra*]; *United States* v. *Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) [right to counsel at pretrial lineup held not retroactive in *Stovall* v. *Denno, supra*]; *Griffin* v. *California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, *reh. denied* 381 U.S. 957 (1965); [comment on defendants' failure to testify violated privilege against self-incrimination held not retroactive in *Tehan* v. *United States, ex rel. Shott,* 392 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), *reh. den.* 383 U.S. 931]; *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); and *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

[advisement of rights held not retroactive in *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), *reh. den.* 385 U.S. 890]. Full retroactive application of the *Lamb* decision would result in the possible release of 24 persons long since validly convicted of criminal offenses. This would mean invalidation of 44 convictions which include convictions for manslaughter, murder, rape and armed robbery or burglary. Retroactive application to 1969, as granted in the opinion below, would immediately affect 12 incarcerated persons and 20 convictions.

If the *Lamb* decision is given retroactive effect to convictions obtained from 1969 to 1972, at least 497 persons would be able to attack the validity of their respective convictions. Full retroactive application could lead to invalidation of at least 2,173 convictions (the number of 16- and 17-year-old inmates received by penal institutions in Oklahoma from 1951 to 1972). Invalidation of these convictions will require unnecessary retrials of cases in which courts had admitted, in reliance upon the prior law, the "void conviction" to enhance punishment or impeach the defendant's credibility.

The retroactive application of the *Lamb* decision will also affect convictions rendered from March 1972 to the present date if pre-*Lamb* convictions were used to enhance punishment or impeach credibility.

In summary, full retroactive application of the decision in *Lamb* would affect the validity of those convictions of males who were between the ages of 16 and 18 years over a period of 33 years. Four categories of convictions would be involved, *i.e.*: (1) convictions for felony offenses; (2)

convictions where the predicate for "former convictions" under the enhancement statutes were pre-*Lamb* convictions; and (4) convictions which are "tainted" because a pre-*Lamb* conviction was used to impeach credibility.

Such a result is totally unwarranted. As stated by Mr. Justice Blackmun in *Gosa* v. *Mayden, supra:*

> "Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which the judgment was rendered or, in other words, when essential justice is not involved."

In the cases below, the contention was that a nonconstitutional claim of right had been unconstitutionally withheld. There is no constitutional right to be tried as a juvenile in the courts of Oklahoma. From the time of statehood until 1972, males aged 16 years never had a statutory claim to be treated as juveniles. In 1972, state statutory authority granted this privilege to males.

Petitioners submit that the *Lamb* decision involved the procedural issue of forum—not whether the habeas applicant should have been tried but, rather, which forum (criminal or juvenile court) should have conducted the proceeding—not whether, but where.

The purpose of the *Lamb* decision was to require that persons similarly aged be offered the equal protection of the juvenile court statutory scheme. The purpose was not to overcome an aspect of the criminal trial which substantially impaired the truth-finding process and accuracy of the guilty verdict. Due to the immediate action taken by the Oklahoma Legislature, the purpose of the ruling in

Lamb was satisfied and the unconstitutional classification no longer exists. It is respectfully submitted that the thirty-year existence of the statutory classification is an operative fact which must be considered. The nature of the statute and its previous application demand examination. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 829 (1940).

IV.

If the court below held correctly that the *Lamb* decision must be given retroactive effect, there is a vital question remaining as to the extent of retroactivity to be ultimately granted. The court below limited the application of the decision in *Lamb* to those convictions obtained since 1969. The court justifies this date for the reason that the *Lamb* decision declared as void Oklahoma Statute Title 10, §1101(a). This Oklahoma statute was enacted in 1968 [Senate Bill 446, codified as 10 O.S. Supp. 1968, §1101 *et seq.*, effective January 13, 1969]. However, the age-sex classification which was declared to be in violation of the equal protection clause extends back to 1941. From 1909 to 1941, the Oklahoma law defined a delinquent child as anyone under the age of 16 years. In 1941, the Oklahoma Legislature amended that definition and defined a juvenile delinquent as a male child under the age of 16 and a female child under the age of 18 years. Therefore, the age-sex classification was the basis for criminal prosecution for a period of over thirty years. By limiting the retroactivity of the *Lamb* decision to 1969, the court has departed from the accepted and usual course of judicial procedure in establishing a date applicable for retroactivity. It is the logical sequence that if an Okla-

homa law was unconstitutional in 1969, that same law would be unconstitutional from its inception, which dates back to 1941.

Although the court below relied upon the Fourth Circuit's decision in *Woodall* v. *Pettibone*, 465 F.2d 49 (4th Cir. 1972), *cert. denied* 413 U.S. 922, the extent of retroactive effect granted by the Tenth Circuit greatly surpassed the limited retroactivity established by the Fourth Circuit. In *Woodall* that court extended retroactive application of their decision in *Long* v. *Robinson*, 436 F.2d 1116 (4th Cir. 1971) [which held that a Maryland statute establishing a geographic-age classification was unconstitutional] to those persons who were still in custody.

Furthermore, that court afforded the State of Maryland an opportunity to establish *nunc pro tunc* that the Maryland Juvenile Court judge would have waived jurisdiction to an adult court.

In these cases, the Tenth Circuit Court granted retroactive application of the *Lamb* decision, *supra*, to those convictions obtained under the authority of 10 O.S. 1969, §1101. Thus, the court did not limit the effect of the *Lamb* decision to those persons still incarcerated or on parole.

V.

The decision below should be reviewed for the reason that the Circuit Court left undecided the question of whether a juvenile court would have certified the habeas applicants as adults. Petitioners submit that this is a far-reaching and important issue that must be decided.

In *Stringfield* v. *Grider*, Case No. 72-C-236, the Federal District Court held that the conviction was void. The State of Oklahoma was not afforded an opportunity to establish that, in view of Stringfield's record and the gravity of the offense with which he was charged, he would have been certified as an adult.

On appeal, the Circuit Court failed to address this issue. It is respectfully submitted that the court below, thus, erred by failing to grant the State of Oklahoma an opportunity to show that the habeas applicant had not been improperly prejudiced.

Furthermore, this omission is in conflict with the holdings made by the Fourth Circuit Court of Appeals. *Brown* v. *Cox*, 481 F.2d 622 (4th Cir. 1973); *Woodall* v. *Pettibone*, *supra*.

VI.

The court below sought to avoid the questions raised by the state court decision in *Schaffer* v. *Green*, *supra*. The fundamental question of the validity of the convictions cannot be answered without an evaluation of the laws of the State of Oklahoma as set forth in *Schaffer*. The decision of the court below is in direct conflict with the applicable state law regarding the validity of those convictions preceding the issuance of the *Lamb* decision. In *Schaffer*, the highest court of the State of Oklahoma hearing criminal matters stated that regardless of a retroactive application of *Lamb*, "the provisions of 21 O.S. §152 shall control until superseded by constitutional legislative enactments in defining as adults all persons over the age of 14."

It is respectfully submitted that the court below failed to follow its own principle of law which states that the interpretation of a state law by the highest court in the state is binding on federal courts. *Chavez* v. *Baker*, 399 F.2d 943 (10th Cir. 1968); *Goldsmith* v. *Cheney*, 447 F.2d 624 (10th Cir. 1971).

CONCLUSION

For the reasons set forth above, petitioners urge that the writ of certiorari be granted.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma

PAUL CROWE
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105

Counsel for Petitioners

of Counsel:
KAY KAREN KENNEDY
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105

February, 1975

APPENDIX "A"

FILED
JUN 14 1974
Howard K. Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM, 1974

TERRY LEE RADCLIFF, Petitioner-Appellant, v. PARK ANDERSON, WARDEN, Respondent-Appellee.	)	No. 73-1520
WILLIAM LYNN STRINGFIELD, Petitioner-Appellee, v. JOHN GRIDER, WARDEN, OKLAHOMA STATE REFORMATORY, SAM ISAACS, PROBATION AND PAROLE OFFICER, DEPARTMENT OF CORRECTIONS, STATE OF OKLAHOMA, Respondents-Appellants.	)	No. 73-1550

[APPENDIX]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(D.C. No. 70-C-81 and No. 72-C-236)

Fred P. Gilbert (Andrew T. Dalton, Jr., on the brief) for Appellant Radcliff and Appellee Stringfield.

Kay Karen Kennedy, Assistant Attorney General (Larry Derryberry, Attorney General of Oklahoma, on the briefs), for Appellee Anderson and Appellants Grider, et al.

Before BREITENSTEIN, SETH and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The issue is the retroactivity of Lamb v. Brown, 10 Cir., 456 F.2d 18, which held that 10 Okl. St. Ann. § 1101 (Supp. 1969) was unconstitutional in that it violated the equal protection clause of the Fourteenth Amendment. Section 1101 allowed the benefits of juvenile court proceedings to females under the age of 18 years but limited those benefits to males under the age of 16 years. The opinion concluded with the statement that: "This ruling shall not apply retroactively." Ibid. at 20.

We now have two habeas corpus cases each brought in the Northern District of Oklahoma by a male who was denied juvenile court proceedings because of age. Petitioner-appellant Radcliff at age 17, was prosecuted as an adult and found guilty of unauthorized use of a motor vehicle. Petitioner-appellee Stringfield, when 17 years old, was prosecuted and sentenced as an adult for second degree burglary. Each claims that § 1101 unconstitutionally deprived him of the right to juvenile proceedings and, hence, the adult proceedings cannot be sustained.

No. 73-1520 is an appeal from the denial of the habeas petition of Radcliff. Judge Daugherty construed the Lamb decision as deciding that the issue there involved was procedural rather than substantive and held that he was bound to follow the declaration that Lamb had no retroactive application. Accordingly, he dismissed the habeas action.

No. 73-1550 is an appeal by the warden of the Oklahoma reformatory from the grant of the habeas petition of Stringfield. Judge Barrow held that the action taken in Lamb was substantive and that the declaration of nonretroactivity was dictum, not binding on him. Accordingly, he granted the habeas writ.

The Lamb decision is the law of the circuit and we are concerned only with its retroactivity. There are decisions that an unconstitutional law must be taken as having no effect whatsoever from the very date of its enactment. See Chicago, Ind. & L. Ry. Co. v. Hackett, 228 U.S. 559, 566; Norton v. Shelby County, 118 U.S. 425, 442; and Ex parte Siebold, 100 U.S. 371, 376. Later cases have rejected this holding. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374; and Linkletter v. Walker, 381 U.S. 622-629. Accordingly, retroactivity must be determined in the light of recent decisions of the Supreme Court.

During its last term the Court reviewed the subject in Robinson v. Neil, 409 U.S. 505, and Gosa v. Mayden, 413 U.S. 665. The opinions in those cases analyzed and scrutinized the Court's previous decisions on retroactivity. Any attempt on our part to reexplore the field would be nonproductive. It is enough that none of the decisions referred to in Robinson and Gosa treat the specific issue before us. Robinson was concerned with the retroactivity of Waller v. Florida, 397 U.S. 387, which barred, on double jeopardy grounds, two prosecutions, state and municipal, based on the same act or offense. In holding that Waller was fully retroactive, the Court said that the practical result of the

constitutional provision against double jeopardy "is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." 409 U.S. at 509.

Gosa v. Mayden, 413 U.S. 665, was concerned with the retroactivity of O'Callahan v. Parker, 395 U.S. 258, which held that a serviceman charged with a nonservice connected crime was entitled to indictment by grand jury and trial in a civilian court. A plurality of the Supreme Court held that O'Callahan should "be accorded prospective application only." 413 U.S. at 685. The Court recognized three dominant considerations applicable to a determination of retroactivity. They were (1) purpose of the new constitutional rule, 413 U.S. at 679, (2) reliance on the old rule, Ibid. at 682, and (3) effect on the administration of justice, Ibid. The Court commented that consideration also must be given to "the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of prior adjudications of guilt." Ibid at 685.

The application of the Gosa tests to the issue before us produces no ready answer. The purpose of Lamb was to end sex discrimination in juvenile proceedings. The reliance on § 1101 was confined to the period between January 13, 1969, its effective date (see statement preceding § 1101 in 1 O.S. 1971), and the March 16, 1972, decision in Lamb. The record contains nothing to show the impact of Lamb on the administration of justice, other than the two cases before us and the possibility of others wherein sex discrimination occurred during the three-year period. The interests of society must be balanced against "essential justice" to the individuals. See Gosa, 413 U.S. at 685.

We have here no question of the accuracy of the fact-finding process. We assume that the adult proceedings to which these boys were subjected resulted in the determination of the truth. In any event, the integrity of the fact-

finding process is not an absolute criterion. See Robinson, 409 U.S. at 508 citing Furman v. Georgia, 408 U.S. 238. Robinson points out that the post-Linkletter cases giving prospective application to procedural rules did not involve "the basic fairness of the earlier trial." 409 U.S. at 509.

The Oklahoma statutes give to children benefits not allowable to adults. These include form of petition (§ 1103), custody (§ 1104), release to parents (§ 1107), temporary detention (§ 1108), conduct of hearings, including a provision for privacy (§ 1111), and discretionary certification for adult proceedings after a preliminary hearing (§ 1112 (b)).

Mr. Justice Black, concurring in In Re Gault, 387 U.S. 1, 59, said that the juvenile laws "provide a system of courts, procedures, and sanctions deemed to be less harmful and more lenient to children than to adults." The petitioners were denied the benefits of the system which Oklahoma provides for children. Accordingly, we are concerned here with both basic fairness and essential justice.

Woodall v. Pettibone, 4 Cir., 465 F.2d 49, dealt with the retroactivity of a federal decision holding unconstitutional upon the ground of denial of equal protection certain Maryland statutes permitting different treatment of juveniles in mentioned geographical areas. The court said that to deny in one area the opportunity to take advantage of diminished responsibility as a juvenile and to allow it in another area "is so fundamentally unfair as to impeach the validity of the 'adult' proceedings and render unreliable the guilty verdicts obtained in those proceedings." 465 F.2d at 52.

A certiorari application in Woodall was denied by the Supreme Court, see 413 U.S. 922, on the same day that it decided Gosa. Although denial of certiorari has normally no implication or inference, we believe that the denial in Woodall, when coupled with the disparity of views expressed in the four opinions filed in Gosa, is some indication

of the attitude of the Supreme Court towards the problem before us. Cf. United States v. Kras, 409 U.S. 434, 443.

No question of retroactivity was presented in Lamb. The statement that its ruling should not apply retroactively, see 465 F.2d at 20, is dictum which arises no higher than "comment merely *obiter*." Hawks v. Hamill, 288 U.S. 52, 59. We believe that the principles of "basic fairness" mentioned in Robinson and "essential justice" mentioned in Gosa require that the Lamb decision be applied retroactively.

In 73-1520, Radcliff, the judgment is reversed and the case is remanded to the district court for further proceedings in the light of this opinion.

In 73-1550, Stringfield, the judgment is affirmed.

No. 73-1520—TERRY LEE RADCLIFF v. PARK ANDERSON, WARDEN

No. 73-1550—WILLIAM LYNN STRINGFIELD v. JOHN GRIDER, WARDEN etc., et al

SETH, Circuit Judge, Dissenting:

I respectfully dissent from the majority opinion. The panel which decided Lamb v. Brown, 456 F.2d 18 (10th Cir.), stated that the holding therein would be applied prospectively only. This to me is a provision properly part of the opinion to express its application and effect. Such a statement is within the authority of a court in the application of its opinions, and is an expression of court policy on the subject. Thus the matter of whether the issue was raised by the parties is not a consideration. Parties are not expected to raise in the pleadings matters relating to an application of an opinion in the same case.

APPENDIX "B"

FILED
JAN 24 1975
Howard K. Phillips
Clerk, United States
Court of Appeals
Tenth Circuit

No. 73-1520—Radcliff v. Anderson

No. 73-1550—Stringfield v. Grider

The petitions for rehearing are severally denied. Chief Judge Lewis, Judges Breitenstein, Holloway, McWilliams, and Doyle concurring. Judges Seth and Barrett dissenting. Judge Hill not participating.

Per Curiam.

The decision herein holds only that the 1972 decision in Lamb v. Brown, 10 Cir., 456 F.2d 18, declaring void on constitutional grounds a 1969 Oklahoma statute, 10 Okl. St. Ann. § 1101 (Supp. 1969), shall be applied retroactively in the cases before us.

The male habeas petitioners in the cases before us were denied the benefits of the Oklahoma statutes pertaining to juveniles. Those benefits were available to females. Lamb says that this discrimination between the sexes is impermissible. The issue in the cases before us is whether the petitioners should be denied the treatment given the petitioner in Lamb because of the statement in that case that it should not be applied retroactively. Integrity of the fact finding process is not determinative. Basic fairness and essential justice demand that these petitioners be treated no differently than the petitioner in Lamb.

[APPENDIX]

No. 73-1520—TERRY LEE RADCLIFF v. PARK ANDERSON, WARDEN.

No. 73-1550—WILLIAM LYNN STRINGFIELD v. JOHN GRIDER, WARDEN, etc. et al.

SETH, Circuit Judge, dissenting:

I must dissent from the majority opinion because, in the final analysis, it appears to me to be based on a pre-*Linkletter* view of the problem, and on a similar position taken in the Fourth Circuit of Woodall v. Pettibone, 465 F.2d 49 (4th Cir.). The adoption by the majority of a standard that any constitutionally unequal classification requires retroactive application will prevent this court from exercising a permitted and proper freedom of choice, and the use of a worthwhile tool of good judicial administration. The opinion also creates a totally unnecessary conflict with state administration of justice.

To arrive at the result it did, the majority must find that the trials of the sixteen- and seventeen-year-old offenders as adults were in some way defective, and the verdicts arrived at therein were "unreliable." It so found those trials to be wanting in the ascertainment of the truth. There were no facts relating to these trials to develop this issue, and the unreliability of the trials was found by complete reliance on the rationale of Woodall v. Pettibone, 465 F.2d 49 (4th Cir.).

Woodall v. Pettibone concerned a prior decision which had held invalid a state law permitting the trial as adults of sixteen- and seventeen-year-old offenders for offenses in the city of Baltimore. The court said that the invalid limitation to Baltimore made the trials there unfair. The court there said:

> ". . . To deny juveniles in Baltimore the opportunity of such a defense ['. . . of his diminished responsibility as a juvenile'] and to allow it to all other juveniles in

> Maryland seems to us so fundamentally unfair as to impeach the validity of the 'adult' proceedings and render unreliable the guilty verdicts obtained in these proceedings."

The defense of "diminished responsibility" is, of course, the same matter as the unequal classification; therefore, the unequal classification makes the adult verdicts unreliable under the rationale in *Woodall*.

The reasoning of the majority here thus is: The classification was unconstitutional, in that some were tried as juveniles and some as adults when all should have been tried as juveniles. Therefore, the verdicts in the adult trials were "unreliable." The "Therefore" part is difficult to jump, but it is the only way to support the retroactivity result. The step thus must be taken by the majority. The "Therefore" need not, and should not be followed by such a surprise. The complete reliance by the majority on Woodall v. Pettibone, 465 F.2d 49 (4th Cir.), and on the denial of certiorari in that case, is unusual in view of the treatment by the Supreme Court of the same problem in Williams v. United States, 401 U.S. 646, and in Stovall v. Denno, 388 U.S. 293.

The Court in Williams v. United States, 401 U.S. 646, considers the uneven effect of nonretroactive application of decisions. It would seem preferable to follow *Williams* and Stovall v. Denno, 388 U.S. 293, rather than *Woodall*. In *Williams*, the plurality opinion said on this point, to distinguish it from the situation where the new constitutional doctrine overcomes an aspect of the trial that substantially impairs its truthfinding function:

> "It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends."

In Stovall v. Denno, the Court said:

> "Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making."

As indicated above, the original adult forum trials must be invalidated to reach the retroactive conclusion. Stovall v. Denno and Williams v. United States do not require nor even lead to such a result, but the majority instead chooses *Woodall*. Once the adult trials are invalidated, the majority concludes with a sweeping statement which is the basis of the opinion:

> "We believe that the principles of 'basic fairness' mentioned in Robinson and 'essential justice' mentioned in Gosa require that the Lamb decision be applied retroactively."

The quotation has a disarming ring of simplicity to it, and indeed who can oppose "basic fairness" and "essential justice." But the choice is not so easily stated and furthermore, neither of the cases referred to leads to the conclusion indicated. The terms quoted above by the majority are not used in the *Robinson* and *Gosa* opinions in the way the majority opinion uses them, and certainly did serve as a basis for the decisions.

In Robinson v. Neil, 409 U.S. 505, at 509, the Court said:

> "A number of the constitutional rules applied prospectively only under the *Linkletter* cases were found not to affect the *basic fairness* of the earlier trial, but to have been directed instead to collateral purposes such as the deterrence of unlawful police conduct, *Mapp* v. *Ohio*, *supra*." [Emphasis added.]

The Court gives examples of rules affecting the fairness of the trials.

The issue is not here raised as to the "fairness" of any trial, the procedures as such are not attacked as being unfair, nor is the comparative accuracy of the ascertainment of the truth at issue. The mention of "fairness" of the trial raises an issue not presented by the parties and not in the case.

As to the "essential justice" referred to by the majority in the quotation above, the Court in *Gosa* did not use the term the way the majority does. The Court in Gosa v. Mayden, 413 U.S. 665, at 685 said:

> "We must necessarily also consider the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of prior adjudications of guilt. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses, particularly military ones, no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when *essential justice* is not involved." [Emphasis added.]

Thus the Supreme Court again refers to the accuracy of the process by which judgment was rendered or, *in other words*, when "essential justice" is not involved. Here again there is no such issue before us of the "accuracy" of the process. This matter is raised by the majority.

It is apparent that the use of the terms quoted by the Supreme Court was to refer to actual procedural-mechanical failures in the trials themselves which rendered the

fact-finding process questionable. We, of course, have no specifics here, and nothing whatever relating to the actual fact-finding process. The issues and the initial *Lamb* case instead concern the selection of alternative processes, the adult prosecution or the juvenile proceedings, each fair and each equally capable of ascertainment of the truth. There are obvious advantages as to penalties and related consequences in the juvenile proceedings over the adult prosecution. Otherwise we would not have these cases. This disparity is, of course, of constitutional magnitude as decided in *Lamb*, but this does not mean, as the majority decides, that "Therefore" the adult trials did not arrive at the truth and the verdicts are questionable. The choice was one of penalty-procedure, and a choice not dominated nor dictated by matters relating to the ascertainment of the truth. The choice was between two equally good methods to ascertain the truth; the consequences which followed were obviously different. In these circumstances, the result should follow that in Gosa v. Mayden,—prospective application, rather than a pre-*Linkletter* standard.

The majority opinion would not permit this court in the future to make a determination that an opinion in a criminal appeal be applied prospectively only. If the past adult trials were invalid under the circumstances here present, it is impossible to imagine any situation where nonretroactivity could be applied. Prospective application is permitted under *Linkletter, Gosa* v. *Mayden, Wolff* v. *McDonnell*, considered in *Stovall* v. *Denno*, and other recent cases. Here instead there is imposed the rigidity of prior constitutional theory referred to above.

The Court, in *Williams* v. *United States*, 401 U.S. 646, said of *Linkletter*:

> "Relying on prior cases, we firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that

prior constructions to the contrary must always be ignored."

Regardless of the freedom of choice available, the majority opinion rejects a consideration of the consequences of the decision upon the administration of the criminal laws in the state over the last thirty years. There is no question as to the actual validity or regularity of the convictions in the past under the state classification based on age and sex. The sixteen- to eighteen-year-old offenders who have been convicted from 1941 to 1973 as adults were accorded the due process rights available to all. The state indicates that these number in the *thousands*. The impact upon the state of retroactive invalidation of these convictions will be very severe and in any event is an unnecessary act.

It is still an unknown factor and ignored by the majority whether the juvenile court would nevertheless have certified these or many other of the many offenders as adults.

I also see no reason why this court cannot designate in an opinion a date when it will be applicable. Historically this has been done, and it is also sound judicial administration to do so in proper circumstances. Under the majority opinion, however, this court is now precluded from doing so. The opinion holds instead that the parties must raise the issue. If the court does it on its own motion, or as an administrative matter, it has uttered some low form of dictum which the opinion says, ". . . arises no higher than 'comment merely *obiter*.'" This certainly is not very high, even on the dictum scale, and indeed must be quite bad. As a matter of fact, the original panel in *Lamb* did this very thing. It set the effective date all by itself, not realizing how very little such a statement "arises," and so received a chastisement by the majority.

[APPENDIX]

No. 73-1520—RADCLIFF v. ANDERSON

No. 73-1550—STRINGFIELD v. GRIDER

BARRETT, Circuit Judge, Respectfully Dissenting:

The majority opinion placed reliance upon the opinions of the Supreme Court in Robinson v. Neil, 409 U.S. 505 (1973), and Gosa v. Mayden, 413 U.S. 665 (1973), as "recent" decisions dealing with the issue of retroactive versus prospective application of a new constitutional rule. By implication, I interpret the reference to these cases to signify that the majority believes that the Supreme Court thereby generated a shift from rules it had previously laid down governing the subject matter. My reading of the cases does not so indicate.

In *Gosa* the Court specifically recognized its time-honored dominant considerations determinative of the retroactive versus prospective application of a new constitutional rule, i.e.: (1) the purpose to be served by the new rule; (2) the extent of reliance placed on the old rule; and (3) the effect on the administration of justice of the retroactive application of the new rule. The Court did in those opinions place emphasis on its concern for both basic fairness and essential justice. The difficulty I encounter, however, arises from the fact that the majority opinion recognizes—as it must—that there was no challenge in *Lamb* aimed at the accuracy of the truth-finding process. There could not have been such a challenge because the condemned proceedings were undertaken under Oklahoma criminal statutes whereby due process requirements were obviously much more stringent and compulsory on the State than those prevailing under Oklahoma juvenile statutes. That being so, I believe that our *Lamb* non-retroactive ruling was on all fours with the rule of reason. The issue in *Lamb* was basically one of *procedural* law, not *substantive* law.

In applying the three considerations determinative of the retroactive versus prospective application set forth in *Gosa, supra,* to the cases at bar, we should first observe that the *sole* justification advanced by the State of Oklahoma in *Lamb* for the age-sex disparities was that the disparity was justified against an equal protection constitutional challenge based upon unexplained "demonstrated facts of life." Lamb v. Brown, 475 P.2d 829 (Okl. 1970). In our *Lamb* opinion we *did not* state that the disparity was without constitutional justification, but rather that no logical justification had been presented for our consideration. It was for that reason that the opinion volunteered that the ruling would not have retroactive application.

Those decisions whereby the courts have granted full retroactive effect to new constitutional rules involve, inter alia: (1) an accused's right to the assistance of counsel at trial, Gideon v. Wainwright, 372 U.S. 335 (1963); (2) specific procedures designed to determine the substantive voluntariness of a accused's confession, Jackson v. Denno, 378 U.S. 368 (1964); (3) an accused's right to confront the witnesses against him, Berger v. California, 393 U.S. 314 (1969); (4) an indigent's right to a free transcript on appeal, Griffin v. Illinois, 351 U.S. 12 (1956), reh. den. 351 U.S. 958; and (5) the impropriety of disqualifying prospective jurors because they have certain views as to capital punishment in proceedings involving the possible imposition of such punishment, Witherspoon v. Illinois, 391 U.S. 510 (1968), reh. den. 393 U.S. 898. The rules announced in these and many like cases were applied retroactively because they were found to be basic deprivation of rights casting serious doubts upon the reliability of the previous judicial determinations—in other words, challenges to the accuracy of the truth-finding process under the old rule. While these decisions necessarily dealt with procedural techniques required to effectuate the new rules, each of the decisions were substantive in nature. Our volunteered nonretro-

active holding in *Lamb, supra,* did not involve a substantive ruling.

To be sure, the issue of retroactive-prospective application was not raised by the parties in *Lamb*. That, however, is of no consequence. It is basic that the Federal Constitution has no voice upon the subject and that, accordingly, retroactive application of new constitutional rules is neither compelled nor prohibited thereby. Tehan v. United States, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

In *Gosa, supra,* relied upon by the majority, the Court held that the three-pronged test heretofore referred to, first announced in Stovall v. Denno, 388 U.S. 293 (1967), required that the decision in O'Callahan v. Parker, 395 U.S. 258 (1969), holding that a serviceman charged with a crime that is not "service connected" is entitled to indictment by a grand jury and trial by jury in a civilian court rather than trial by court-martial, and that the ruling be accorded *prospective effect only*. And in the recent case of Wolff, Warden, et al. v. McDonnell, ... U.S. ....., (No. 73-679, June 26, 1974), the Supreme Court reversed the holding of the Court of Appeals that certain due process requirements involving prison disciplinary proceedings were to be applied retroactively. In *Wolff*, the Supreme Court held that the retroactivity of new procedural rules is effectively foreclosed by its holding in Morrissey v. Brewer, 408 U.S. 471 (1972). The Court, on page 32 of its slip opinion, said:

> Despite the fact that procedures are related to the integrity of the fact-finding process, in the context of disciplinary proceedings, where less is generally at stake for an individual than at a criminal trial, great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, *and the reliance prison officials placed, in good faith, on prior law not requiring such procedures.* (Emphasis supplied.)

The United States Supreme Court has shied away from applying constitutional rulings retroactively in criminal cases because of the unknown number of convictions which would be affected. DeStefano v. Woods, 392 U.S. 631 (1968); Desist v. United States, 394 U.S. 244 (1969). The *Lamb* holding, as noted, was not entered to overcome errors in the criminal trials which impaired the truth finding process and the accuracy of the guilty verdicts [Linkletter v. Walker, supra], or to guarantee a specific constitutional right. THE HOLDING INVOLVED THE PROCEDURAL ISSUE OF FORUM—NOT WHETHER LAMB SHOULD HAVE BEEN TRIED BUT, RATHER, WHICH FORUM (CRIMINAL COURT OR JUVENILE COURT) SHOULD HAVE CONDUCTED THE PROCEEDINGS—NOT WHETHER, BUT WHERE. The sole purpose was to deter further age/sex discriminations, absent constitutional justification.

In my judgment we must here recognize that Oklahoma relied upon the condemned statute re sex/age differential in all good faith for some thirty-one years without challenge. It is most inappropriate for the Court to now proceed to *nullify* and *void* all Oklahoma state convictions from 1941 to 1972 rendered under the condemned statute, involving at least some 2,173 convictions unquestionably accounted for. Furthermore, at the date of our *Lamb* decision there were 24 males incarcerated under the condemned act, convicted after April 4, 1972, who can overturn their convictions in reliance of the *Lamb* retroactive application involving, inter alia, the commission of the crimes of Rape, Manslaughter, Burglary, Larceny, and Robbery with Firearms. It is unknown whether or how many could be effectively retried. Releasing those convicted of serious offenses against persons and property to the public "streets" without knowledge of the ability of the State to effectively undertake the burden of other proceedings, or to seek any recourse would, in my opinion, be wholly contrary to public policy. In addition, we now know that the

records involving crimes committed by at least 2,173 males prosecuted under the condemned statute relied upon by Oklahoma officials for thirty-one years will have a most serious effect on the administration of justice by application of the *Lamb* ruling retroactively because their records must be expunged, again effectively impeding the search for truth—that which I consider the primary objective of the criminal justice system. By comparison, the juvenile records of female offenders under the age of 18 years shall *not* be expunged. This, I suggest, creates a question of basic fairness. In terms of essential justice, the Oklahoma statutes—although discriminatory between the sexes in the specific age categories—were not discriminatory in terms of application on the particular class, i.e., male or female.

Our ruling here assures that males between ages 16 and 18 in the following four categories of convictions are absolutely "home free" by reason of the retroactive application, i.e.: (1) those who were convicted of felony offenses; (2) those whose convictions were the predicate for "former convictions" under enhancement statutes; (3) those who committed misdemeanors; and (4) those whose convictions may have been used to impeach their credibility.

I believe that the following observations made by Mr. Justice Blackmun, in writing for the majority in Gosa v. Mayden, *supra*, are most appropriate to the case at bar:

> We must necessarily consider the impact of a retroactivity holding on the interest of society when the new constitutional standard promulgated does not bring into question the accuracy of prior adjudication of guilt. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses, particularly military ones, no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result

of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved.
413 U.S. at 685.

APPENDIX "C"

FILED
JUN 6 1973
Jack C. Silver, Clerk
U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE MATTER OF TERRY LEE RADCLIFF, Petitioner,	)	
-vs-	)	Case No. 73-C-81
PARK ANDERSON, WARDEN, OKLAHOMA STATE PENITENTIARY, Respondent.	)	

ORDER

Petitioner, a State prisoner, has filed a Petition for Writ of Habeas Corpus alleging that he is being held in custody unlawfully on a conviction for armed robbery after former conviction of a felony. Petitioner complains that the former conviction involved in the conviction and sentence he is now serving was void and illegal for the reason that it was for an offense he committed while 17 years of age. It is alleged that the former conviction under attack was imposed in the District Court of Tulsa County, State of

Oklahoma, on December 6, 1965 and should be vacated for the reason that his constitutional right to the equal protection under the laws was violated due to his being tried as an adult while a female of like age would have had the purported benefit of being prosecuted as a juvenile for the commission of the same offense. The Petitioner has been denied State relief and has exhausted his available State remedies as to the complaint raised herein.

Petitioner relies on *Lamb* v. *Brown*, 456 F. 2d 18 (Tenth Cir. 1972), in which case the Court stated:

> "Because the purpose of the disparity in the age classification between 16-18 year old males and 16-18 year old females has not been demonstrated, we hold that 10 Okl.St.Ann. §1101(a) is violative of the equal protection clause. THIS RULING SHALL NOT APPLY RETROACTIVELY." (Emphasis supplied.)

Petitioner urges that he is entitled to the benefit of the *Lamb* decision alleging that the cases of *Robinson* v. *Neil*, ____ U.S. ____, 93 S.Ct. 876, 35 L.Ed. 2d 29 (1973) and *Woodall* v. *Pettibone*, 465 F.2d 49 (Fourth Cir. 1972) are controlling. It is presumed that Petitioner desires this Court to disregard the plain language of our Court of Appeals in the *Lamb* decision and apply same retroactively to his former conviction. The Respondent contends that this Court should deny the Writ and dismiss this action for the reason that Petitioner's earlier conviction under attack was had prior to the *Lamb* decision and said decision therefore cannot apply thereto.

In the case of *Myer Aaron Ruhm* v. *Bob Turner, Sheriff, et al.*, ____ F. Supp. ____ (W.D. Okl. 1973), this Court concluded that our Court of Appeals determined that its ruling in *Lamb* did not meet the pertinent criteria for retroactive application and, "shall not apply retroactively." See *Linkletter* v. *Walker*, 381 U.S. 618 (1965) and Annotation, Prospective or Retroactive Operation of Overruling Decision, 10 ALR 3d 1371.

The case of *Woodall* v. *Pettibone, supra,* relied upon by Petitioner is a decision wherein the United States Court of Appeals for the Fourth Circuit gave retroactive application to a ruling that a Maryland law requiring 16 and 17 year olds in Baltimore to be tried as adults whereas those of such ages in other parts of the state came within the jurisdiction of the juvenile courts was unconstitutional. The *Woodall* decision by another Circuit does not control over *Lamb* in our Circuit as to retroactivity.

In *Robinson* v. *Neil, supra,* the Supreme Court considered the line of cases following its landmark decision of *Linkletter* v. *Walker, supra,* relating to determining which rulings were to be accorded retrospective and which prospective effect. The Court stated in 35 L. Ed. 2d pp. 32 and 33:

> ". . . Linkletter and the other cases relied upon by the Sixth Circuit dealt with those constitutional interpretations bearing on the use of evidence or on a particular mode of trial. Those procedural rights and methods of conducting trials, however, do not encompass all of the rights found in the first eight Amendments. Guarantees that do not relate to these procedural rules cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis. For the purpose and effect of the various constitutional guarantees vary sufficiently among themselves so as to affect the necessity for prospective rather than retrospective application."
>
> * * * * * *
>
> "The guarantee against double jeopardy is significantly different from procedural guarantees held in the Linkletter line of cases to have prospective effect only. While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules which govern

the conduct of a trial. A number of the constitutional rules applied prospectively only under the Linkletter cases have been directed instead to collateral purposes such as the deterrence of unlawful police conduct, Mapp v. Ohio, supra. In Waller, however, the Court's ruling was squarely directed to the prevention of the second trial taking place at all, even though it might have been conducted with a scrupulous regard for all of the constitutional procedural rights of the defendant."

Robinson v. *Neil, supra,* stands for the proposition that a double jeopardy situation is substantive and not procedural because a second trial is not allowed and therefore a new decision in this field should be ordered to be retroactive. In *Lamb, supra,* our Circuit apparently treated the situation therein involved (adult proceeding or juvenile proceeding) to be procedural in nature rather than substantive as a proceeding would take place in any event and thereupon directed that its decision in *Lamb, supra,* shall not apply retroactively.

This Court fully agrees with these determinations made in *Lamb, supra,* and certainly is not inclined to proceed contrary to the decision and directive of that case that the decision therein shall not be applied retroactively.

Plaintiff's action is dismissed.

It is so ordered this 6th day of June, 1973.

s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX "D"

FILED
JUN 21 1973
Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM LYNN STRINGFIELD, Petitioner,	)	
vs.	)	72-C-236
JOHN GRIDER, Warden, Oklahoma State Reformatory, Granite, Oklahoma, Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ENTRY OF JUDGMENT

THE COURT, having examined the files and records of this proceeding, together with the files and records in State of Oklahoma vs. William Lynn Stringfield, Case No. CRF-71-27 in the District Court of Tulsa County, State of Oklahoma, including the transcript of the proceedings had in said matter, and the Second Report of the United States Magistrate concerning the same and being fully advised in the premises, makes the following findings of fact, conclusions of law and entry of judgment.:

A. FINDINGS OF FACT:

1. This is an original habeas corpus action brought under Title 28 U.S.C. § 2254 et seq. by the petitioner to vacate and set aside a state conviction and sentence of five years imprisonment imposed upon him by the District

Court of Tulsa County, Oklahoma in Case Number CRF 71-27, for the offense of Second Degree Burglary.

2. The petitioner is a member of the male sex, and was born on December 9, 1953. Therefore, the petitioner was 17 years of age on January 4, 1971, the date upon which he is alleged to have committed the offense in question and was 17 years of age during all stages of the state court prosecution. In 1971 in Oklahoma, there existed a discrimination between males and females in the 16 to 18 year old category in that males were considered accountable as adults for the purposes of criminal prosecution at age 16, whereas females continued to enjoy the benefits and leniency of Oklahoma's juvenile code until their attainment of the age of 18. Title 10 O.S. 1970 Supp., § 1101(a).

3. The petitioner pleaded guilty to the charge in question on March 11, 1971. However, under the provisions of the "deferred sentence" procedure then obtaining in Oklahoma, Title 22 O.S. § 991(a), the Tulsa County District Court declined to formally impose sentence at that time, but instead "deferred" the imposition of sentence for a two-year period (until March 11, 1973), conditioned upon the petitioner's good behavior and compliance with certain conditions of "probation," and assuming completion of the two years under the deferred sentence scheme petitioner would have been allowed to withdraw the plea and the case would be dismissed. The deferred sentence differed from the suspended sentence, and from actual probation, in that under the deferred sentence the defendant would not actually suffer a conviction.

4. On August 9, 1971 the State of Oklahoma filed an application to accelerate judgment and sentence in the case against the petitioner. Functionally this procedure is equivalent to revocation of a conventional suspended sentence.

5. On August 30, 1971, the Tulsa County District Court ordered the imposition of petitioner's sentence be "accel-

erated" and thereupon sentenced the petitioner to a term of five years imprisonment.

6. The basis for "accelerating" petitioner's sentence was "refusing to obtain and keep employment," "by violating his curfew as set out in the rules," and "by refusing to obey instruction of his probation officer." No further elaboration of the cause of petitioners "acceleration" appears in the record.

7. Petitioner perfected a proper petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals. This was the statutory method of seeking a review from a plea of guilty. That petition raised the issues presented in this action. The petition was denied without opinion on November 1, 1971, in *William Stringfield* vs. *The State of Oklahoma*, Okl. Cr., No. A 17042, unreported.

8. Thereafter petitioner pursued a statutory application for post-conviction relief, which was filed in the original Tulsa County District Court action under the Oklahoma Post Conviction Act, Title 22 O.S. §§ 1080 et seq. That action again raised all the issues presented in this action. The application was denied on July 7, 1972.

9. The habeas corpus proceeding was then filed before this Court. At that time petitioner was physically incarcerated in the Oklahoma State Reformatory at Granite, Oklahoma, in the actual custody of John Grider, Warden. Since the filing of the instant petition the petitioner has been released on parole, and pursuant to Rule 21, Federal Rules of Civil Procedure, Sam Isaacs, Parole Officer, Department of Corrections, State of Oklahoma, should be added as a party respondent.

10. In this action the petitioner has urged two grounds for relief: First, that it was an unconstitutional discrimination, based upon sex, and violative of the Equal Protection Clause of the Fourteenth Amendment, to prosecute and punish 16 to 18 year old males as adults and felons for their

offenses when 16 to 18 year old females were being processed only as juveniles and delinquents for their misconduct; that such discrimination was expressly held unconstitutional in the case of *Lamb* vs. *Brown* (10th Cir. 1972) 456 F.2d 18 and that *Lamb* vs. *Brown* must be viewed as fully retroactive so as to be applicable to petitioner in view of such decisions as *Woodall* vs. *Pettibone* (4th Cir., 1972) 465 F.2d 49 and *Robinson* vs. *Neal* (1973) ..... U.S. ....., 93 S. Ct. 876.

Second, the petitioner contends that the State Court's imposition of a *five* year sentence was improper in that the original "deferral" for two years constituted, in substance, a sentence to two years on a probationary status; that even if properly revoked, an increase to five years constitutes a violation of the Double Jeopardy guarantee and Due Process guarantees of the U. S. Constitution. See *North Carolina* vs. *Pearce* (1969) 395 U.S. 711. And, in any event the severity of the increase is grossly disproportionate to the assertedly trivial nature of petitioner's probationary wrongdoings. Further petitioner contends that the alleged failure at succeeding in or pursuing economic endeavor cannot be constitutionally utilized as a grounds for revocation or acceleration.

11. The Attorney General of the State of Oklahoma, for the respondent, resists the first ground for relief on the basis that: (1) *Lamb* vs. *Brown*, supra., is, by its own terms non-retroactive; and, (2) that in any event, subsequent state decisions have interpreted *Lamb* vs. *Brown*, Supra., as having *reduced* the age of accountability to the age of 14, citing *Schaffer* vs. *Green* (Okl. Cr., 1972) 496 P.2d 375 and *Dixon* vs. *State* (Okl. Cr., 1972) 497 P.2d 1110.

The Attorney General defends the second ground for relief on the basis that a "deferral" of a sentence does not constitute a "sentence" or "punishment" for double jeopardy purposes, and that until sentence was formally imposed, the trial court still had full discretion to impose any sentence within the established range of punishment for the

offense; and that the probationary violations enumerated in the application to "accelerate" were sufficient to revoke or accelerate the petitioner's probationary or deferred status.

12. These and related matters were disclosed at the pre-trial hearing before the Magistrate held herein on January 4, 1973, at which time certain factual and documentary items were offered and/or agreed to. The Magistrate then directed briefs to be submitted on the issues, and also the Attorney General in the Order to respond to the petitioner's Petition for Habeas Corpus, was directed to submit a transcript of the petitioner's acceleration proceedings.

13. Briefs were thereafter submitted by both sides but the above mentioned transcript has never been supplied.

B. CONCLUSIONS OF LAW:

1. This Court has jurisdiction and venue over the instant cause. Title 28 U.S.C. § 2254 (d) and the requirement of exhaustion of state remedies has been met by the filing of an application for Writ of Certiorari to the Oklahoma Court of Criminal Appeals and by the filing of an application for Post Conviction Relief, both raising the issues herein presented. Jurisdiction is retained notwithstanding the petitioner's release on parole. *Jones* vs. *Cunningham* (1962) 371 U. S. 236; *Carafas* vs. *LaVallee* (1967) 391 U. S. 3060.

2. The Court finds that Petitioner's conviction and punishment as an adult, for an offense committed when he was but 17 years of age, and at a time when a 17 year old female would only have been processed as a juvenile therefor, was and is in violation of the Equal Protection of the Laws Clause of the Fourteenth Amendment to the United States Constitution. *Lamb* vs. *Brown* (10th Cir., 1972) 456 F.2d 18; *Reed* vs. *Reed* (1971) 404 U.S. 71; see also *Long* vs. *Robinson* (D.C. Md., 1970) 316 F. Supp. 22, aff'd. 436 F.2d 1116 (4th Cir., 1971).

The Court is also persuaded that the *Lamb* vs. *Brown* case, supra., must also apply retroactively, despite *dictum* therein to the opposite effect. Not only was the question of retroactivity not before the Tenth Circuit in *Lamb* as an issue but also the question of retroactivity has been resolved favorably to the petitioner in two persuasive and controlling Federal opinions rendered since *Lamb* vs. *Brown* was decided.

The first, *Woodall* vs. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. pend., considered a situation arising in the State of Maryland virtually identical with the factual situation presented by petitioner's case. Under the Maryland juvenile code, a youngster in Baltimore was deemed criminally accountable as an adult at age 16, but youths elsewhere in Maryland continued to enjoy juvenile status to age 18. In the *Long* vs. *Robinson* cases cited above, 316 F. Supp. 22, 436 F.2d 1116, the Fourth Circuit held that discrimination to be unconstitutional as applied to those unfavored youths 16 to 18 years of age charged with adult offenses in Baltimore, and ordered their purported adult convictions vacated. However, the Fourth Circuit declined to pass on the retroactivity of its ruling at that time.

In *Woodall* vs. *Pettibone*, supra., the Fourth Circuit squarely faced the retroactivity problem posed by its *Long* vs. *Robinson* decision; and, in a carefully researched and well reasoned opinion held that its decision in *Long* vs. *Robinson* would have to apply retroactively. To summarize the *Woodall* opinion, the Fourth Circuit concluded that the rule of prospectivity appeared to apply primarily with new decisions establishing novel rules of procedure; but that the more fundamental or substantive the nature of the new ruling the more the Courts apply the rule retroactively. The Fourth Circuit concluded that the discrimination against the unfavored youngsters to be so basic and severe that it would be a fundamental injustice to deny to them the benefit of the *Long* vs. *Robinson* rule.

Thereafter in January of this year the United States Supreme Court clarified the situation regarding whether a new decision would apply prospectively or retroactively. In *Robinson* vs. *Neil* (1973) ___ U.S. ___, 93 S.Ct. ___, Mr. Justice Rehnquist, writing for a unanimous Court, reiterated that the full retroactivity of new decisions based on constitutional considerations is still the "general rule" and he further pointed out that most of the Supreme Court's new decisions which were restricted to a prospective application fell into the category of evidentiary matters or having to do with new rules of procedure. The Court also emphasized that decisions related to "the integrity of the fact-finding process" are not the *only* ones to enjoy a retroactive application.

3. This Court, applying the rule of *Robinson* vs. *Neil*, supra., concludes that the guarantee of Equal Protection of the Laws is significantly and inherently different from procedural guarantees which have been held to have prospective effect only. Had there been in effect in Oklahoma at the time of petitioner's conviction as an adult, a non-discriminatory statute whereby all persons to the age of 18 would have been treated as juveniles, rather than only females being so treated, the result would have been to prevent the adult proceedings from having taken place at all—absent a proper certification—and thus the then existing juvenile code in Oklahoma, Title 10 O.S. 1970 Supp. § 1101(a), was not one prescribing procedural rules which govern the conduct of a trial, even though the trial (as an adult) "might have been conducted with a scrupulous regard for all the constitutional procedural rights of the defendant."

4. In consideration of *Robinson* vs. *Neil*, supra., and *Woodall* vs. *Pettibone*, supra., and in view of the fundamental issues and rights at stake in this case and as decided by *Lamb* vs. *Brown*, supra., the Court concludes that *Woodall* and *Robinson* control, and the Court holds *Lamb* vs.

Brown (10th Cir., 1972) 456 F.2d 18 to have retroactive application and hence available to petitioner, and applicable to his instant litigation.

5. Having concluded that *Lamb* vs. *Brown*, supra., applies to this case the Court finds that the contention of the Attorney General that all convictions are valid if occurring after the person reaches the age of 14 overlooks the fact that in *Lamb* the petitioner, *Lamb*, had his conviction vacated and set aside. Since the conviction of the petitioner, Stringfield, suffers from the same Constitutional defect as did that of Lamb, and since the Court finds that the decision in *Lamb* is applicable to this cause, the result must be that petitioner Stringfield's conviction is also void.

6. In view of the fact that the Court grants to petitioner relief on the basis presented in his first contention, it becomes unnecessary for the Court to pass upon his other contention that his "acceleration," resulting in an increased sentence of from two to five years, is in violation of his constitutional rights.

IT IS, THEREFORE, ORDERED:

1. That Sam Isaacs, Probation and Parole Officer, Department of Corrections, State of Oklahoma, be and he is hereby added as a party respondent.

2. That the petitioner's motion pursuant to § 2254, Title 28, U.S.C., is granted.

3. That a copy of this Order be mailed by the Clerk of this Court to the petitioner, together with a copy of the Second Report of the United States Magistrate.

4. That the Clerk of this Court furnish to respondent a copy of this Order, together with a copy of the Second Report of the United States Magistrate, by mailing the same to the Attorney General of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

5. That counsel for petitioner prepare and submit a formal Writ of Habeas Corpus.

Dated this 21st day of June, 1973.

s/ Allen E. Barrow
CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA.

APPENDIX "E"

JULY TERM—August 31, 1973

Before Honorable David T. Lewis, Chief Judge, Honorable John C. Pickett, and Honorable Oliver Seth, Circuit Judges

TERRY LEE RADCLIFF, Petitioner-Appellant, vs. PARK ANDERSON, Warden, Oklahoma State Penitentiary, Respondent-Appellee.	)	NO. 73-1520
WILLIAM LYNN STRINGFIELD, Petitioner-Appellee, vs. JOHN GRIDER, Warden, Oklahoma State Reformatory, SAM ISAACS, Probation and Parole Office, Department of Corrections, State of Oklahoma, Respondents-Appellants.	) CONSOLIDATED CASES) NO. 73-1550	

[APPENDIX]

Upon consideration of the records and files in these cases, it is ordered that the motion to affirm in Stringfield v. Grider, 73-1550, and the motion to reverse in Radcliff v. Anderson, 73-1520 are denied. The motion to consolidate the two cases for briefing and oral argument is granted.

The cases are assigned to Calendar B. The appellants shall file their briefs, original and nine copies, on or before September 21, 1973. The appellees shall file their briefs on or before October 12, 1973. The Clerk will notify the parties when these cases are set for oral argument and submission.

s/ Howard K. Phillips, Clerk

APPENDIX "F"

JULY TERM—JULY 9, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

TERRY LEE RADCLIFF,	)	
	)	
Petitioner-Appellant,	)	
v.	)	NO. 73-1520
	)	
PARK ANDERSON, Warden, Oklahoma State Penitentiary,	)	
	)	
Respondent-Appellee.	)	
	)	
WILLIAM LYNN STRINGFIELD,	)	
	)	
Petitioner-Appellee,	)	
v.	)	NO. 73-1550
	)	
JOHN GRIDER, Warden, Oklahoma State Reformatory, SAM ISAACS, Probation and Parole Office, Department of Corrections, State of Oklahoma,	)	
	)	(CONSOLIDATED
Respondents-Appellants.	)	CASES)

The captioned consolidated cause comes on for consideration of a petition for rehearing en banc filed by the Attorney General of Oklahoma on June 28, 1974.

Upon consideration whereof, it is ORDERED that the parties to the controversy shall simultaneously file any additional briefs or supplements to briefs which they desire

the Court to consider in rehearing the captioned cause, on or before July 29, 1974.

It is the further ORDER of the Court that the opinion of the Court heretofore filed on June 14, 1974, is withdrawn.

It is further ORDERED that the Judgment entered June 14, 1974, in accordance with that opinion, is vacated.

The petition for rehearing en banc is granted. The parties will be notified of the date when en banc hearing will be held subsequent to the simultaneous filing of additional or supplemental briefs.

s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By
s/ Anne Cabot
Deputy Clerk

APPENDIX "G"

JULY TERM—JULY 10, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

TERRY LEE RADCLIFF, Petitioner-Appellant,	)	
v.	)	NO. 73-1520
PARK ANDERSON, Warden, Oklahoma State Penitentiary, Respondent-Appellee.	)	
WILLIAM LYNN STRINGFIELD, Petitioner-Appellee,	)	
v.	)	NO. 73-1550
JOHN GRIDER, Warden, Oklahoma State Reformatory, SAM ISAACS, Probation and Parole Office, Department of Corrections, State of Oklahoma, Respondents-Appellants.	)	(CONSOLIDATED CASES)

The Court, upon its own motion, and in order to correct clerical error, withdraws the Order regarding the En Banc Hearing which was entered in the consolidated cases above on July 9, 1974, and in substitution therefor, enters the following Order:

Upon the suggestion of the respondent-appellee in No. 73-1520 and of the respondent-appellant in No. 73-1550

and upon a vote of the Judges in regular active service, it is ORDERED:

1. The petition for rehearing of these consolidated cases shall be heard and determined by the Court sitting en banc pursuant to 28 U.S.C. § 46(c).

2. The rehearing is limited to the issue of the retroactivity of this Court's decision in *Lamb* v. *Brown*, 456 F.2d 18, that 10 Okl. St. Ann. § 1101 (Supp. 1969) is unconstitutional.

3. The parties to these consolidated cases may file such additional or supplemental briefs as they may desire on or before July 29, 1974.

4. The parties to case No. 71-1355, *Lamb* v. *Brown*, shall be given notice of this Order and may appear and file briefs on or before July 29, 1974.

5. No oral argument on the rehearing will be permitted unless the Court so Orders on its own motion.

s/ Howard K. Phillips
HOWRAD K. PHILLIPS
Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By
s/ Anne Cabot
Deputy Clerk

CERTIFICATE OF MAILING

This is to certify that I mailed three copies of the above and foregoing instrument to which this certification is attached, to the following named counsel of record this _____ day of _____, 1975:

Mr. Fred P. Gilbert
Attorney at Law
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103

Mr. Andrew T. Dalton, Jr.
Attorney at Law
2536 East 51st Street
Tulsa, Oklahoma 74105

_____

PAUL CROWE